

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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IN RE: NEW YORK CITY ASBESTOS LITIGATION	: NYCAL
-----X	: I.A.S. Part 11
This Document Relates To:	: (Madden, J.)
	: :
FRANK BIANCO, et al.,	: Index No. 115546-06
	: :
Plaintiffs,	: :
	: :
-against-	: :
	: :
A.C. & S., et al.,	: :
	: :
Defendants.	: :
-----X	

PLAINTIFFS' AFFIRMATION IN SUPPORT OF THEIR MOTION, PURSUANT TO FRYE V. UNITED STATES, AND *IN LIMINE*, 1) TO PRECLUDE THE NOVEL, UNSCIENTIFIC, NOT GENERALLY-ACCEPTED, LITIGATION-BASED, PREVIOUSLY EXCLUDED ASBESTOS "DOSE RECONSTRUCTION"/"EXPOSURE ASSESSMENT" ANALYSES AND ALL TESTIMONY RELATED THERETO, AND 2) TO PRECLUDE THE CASE-SPECIFIC REPORTS AND RELATED TESTIMONY OF DRS. RABINOVITZ AND WEINBERG SPECIFICALLY AS IMPROPER

Thomas Comerford, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the truth of the following matters pursuant to C.P.L.R. § 2106:

1. I am an associate with the law firm of Weitz & Luxenberg, P.C., attorneys for plaintiffs Frank Bianco, James Director, Karl Felten, Harvey Helfand, Christian Holinka, Jack Nacht, Frederick Ritzer, Joseph Saccomano, and Robert Sheppard (collectively the "Plaintiffs"), and, as such, am familiar with the facts and circumstances within.
2. This affirmation is submitted in support of Plaintiffs' Motion, pursuant to Frye v. United States, and *in limine*, to preclude the novel, unscientific, not generally accepted,

litigation-based, previously excluded asbestos “dose reconstruction” / “exposure assessment” analysis and all testimony relating thereto and to preclude the case-specific reports and related testimony thereto of Drs. Rabinovitz and Weinberg as improper.

3. The facts and legal argument in support of this motion are set forth in Plaintiffs’ accompanying memorandum of law, and for the sake of brevity, will not be restated herein.

4. Annexed hereto as **Exhibit A**, is a true and exact copy of the relevant portions of the trial transcript from In Re: Jose Lopez, New York, Index No. 120954/2000, February 14, 2002.

5. Annexed hereto as **Exhibit B**, is a true and exact copy of the relevant sections of the Transcript of Conference/Motion Proceedings, Colella/D’Ulisse v. A.C. & S., et al., New York, Index No. 103894/05, August 31, 2006.

6. Annexed hereto as **Exhibit C**, is a true and exact copy of the Transcript from Audiotapes of the American Industrial Hygiene (AIHA) Conference and Expo, June 27, 2002.

7. Annexed hereto as **Exhibit D**, is a true and exact copy of an Expert Report RE: Jack Nacht, by John Spencer, April 23, 2007.

8. Annexed hereto as **Exhibit E**, is a true and exact copy of an Expert Report RE: Harvey Helfand, by John Spencer, April 24, 2007.

9. Annexed hereto as **Exhibit F**, is a true and exact copy of an Expert Report RE: Harvey Helfand, by James C. Rock, July 12, 2007.

10. Annexed hereto as **Exhibit G**, is a true and exact copy of an Expert Report RE: James Director, by William L. Dyson, July 13, 2007.

11. Annexed hereto as **Exhibit H**, is a true and exact copy of Goodyear Expert Witness List, dated April 27, 2007.
12. Annexed hereto as **Exhibit I**, is a true and exact copy of an Expert Report RE: Harvey Helfand, by Dennis C. Ertel, August 1, 2007.
13. Annexed hereto as **Exhibit J**, is a true and exact copy of an Expert Report RE: Christian Holinka, by Robert C. Adams, July 18, 2007.
14. Annexed hereto as **Exhibit K**, is a true and exact copy of an Expert Report RE: Christian Holinka, by Robert N. Sawyer, July 27, 2007.
15. Annexed hereto as **Exhibit L**, is a true and exact copy an Expert Report RE: Harvey Helfand, by Kenneth A. Mundt, June 6, 2007.
16. Annexed hereto as **Exhibit M**, is a true and exact copy of an Expert Report RE: Jack Nacht, by Kenneth A. Mundt, June 5, 2007.
17. Annexed hereto as **Exhibit N**, is a true and exact copy of an Expert Report RE: Harvey Helfand, by Mark F. Durham, May 31, 2007.
18. Annexed hereto as **Exhibit O**, is a true and exact copy of Mannington Mills, Inc.'s List of Expert Witnesses, May 8, 2007.
19. Annexed hereto as **Exhibit P**, is a true and exact copy of Mansfield Plumbing Products Expert Witness Response RE: Francis Bianco, August 13, 2007.
20. Annexed hereto as **Exhibit Q**, is a true and exact copy of T H Agriculture & Nutrition, LLC (THAN) Expert Witness List RE: James Director, June 26, 2007.
21. Annexed hereto as **Exhibit R**, is a true and exact copy of an Expert Report RE: Francis Bianco, by Frederick Boelter, August 13, 2007.

22. Annexed hereto as **Exhibit S**, is a true and exact copy of an Expert Report RE: Francis Bianco, by Robert N. Sawyer, August 7, 2007.

23. Annexed hereto as **Exhibit T**, is a true and exact copy of an Expert Report RE: Joseph Saccomano, by Frederick Boelter, August 14, 2007.

24. Annexed hereto as **Exhibit U**, is a true and exact copy of the relevant portions of the Dr. William L. Dyson preclusion ruling by Judge James C. Fox, Pollard v. Owens Corning, USDC, North Carolina, February 13, 1999.

25. Annexed hereto as **Exhibit V**, is a true and exact copy of the Expert Report RE: Christian Holinka, by Dr. Sheldon H. Rabinovitz, July 24, 2007.

26. Annexed hereto as **Exhibit W**, is a true and exact copy of the Expert Report RE: Christian Holinka, by Dr. Kenneth S. Weinberg, July 30, 2007.

27. Annexed hereto as **Exhibit X**, is a true and exact copy of relevant sections of the Deposition Transcript of Christian Holinka, February 12, 2007.

28. For the reasons set forth in the accompanying memorandum of law, Plaintiffs respectfully request that any of the proposed defense experts be precluded from testifying about dose reconstruction and/or exposure assessment as it pertains to any of the Plaintiffs; that the Defendants be precluded from admitting any documentary evidence or testimony of dose reconstruction and/or exposure assessment, quantitatively or qualitatively; and that the case-specific expert reports and any testimony relating thereto of Drs. Rabinovitz and Weinberg as to the Christian Holinka case be precluded from trial.


Certification Pursuant To 22 N.Y.C.R.R. § 130-1

29. I hereby certify, pursuant to 22 N.Y.C.R.R. § 130-1.1-a(b), that to the best of my knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of papers listed below or the contentions therein are not frivolous as defined in 22 N.Y.C.R.R. § 130-1.1-(c).

Dated: New York, New York
August 21, 2007

Respectfully submitted,

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(212) 558-5500
Attorney for Plaintiffs

By: 
Thomas M. Comerford

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1
2 SUPREME COURT OF THE STATE OF NEW YORK
3 NEW YORK COUNTY: PART 8

4 -----X
5 IN RE: NEW YORK CITY ASBESTOS LITIGATION,

Index No.
40000/88

6 THIS DOCUMENT APPLIES TO JOSE LOPEZ 120954/2000

7 -----X
8 60 Centre Street
9 New York, New York 10007
10 February 14, 2002

11 B E F O R E: HONORABLE DIANE A. LEBEDEFF, Justice

12 A P P E A R A N C E S:

13 WEITZ & LUXENBERG, ESQS.
14 Attorneys for Plaintiff
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16 New York, New York 10038
17 BY: ROBERT GORDON, ESQ.
18 RICHARD MEADOW, ESQ.

19 DRINKER, BIDDLE & SHANLEY, ESQS.
20 Attorneys for Honeywell and Allied Signal
21 500 Campus Drive
22 Florham Park, New Jersey 07932
23 BY: MICHAEL R. CLARKE, ESQ.

24 -and-
25 WILCOX, SAVAGE, ESQS.
26 One Commercial Plaza
Norfolk, Virginia 23510
BY: BRUCE T. BISHOP, ESQ.

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JOAN DONNELLY
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1 C. Blake - by Defts. - Direct

2 million of them in a cubic meter of air -- would
3 have one fiber in it, just to give you a feeling
4 for how many are out there.

5 And I said you could breathe as much
6 as ten cubic meters of air. Under that
7 measurement in a day, you can breathe that many
8 fibers.

9 Q. Then once you've measured -- let's say
10 you have one fiber per cc.; one fiber per cubic
11 centimeter.

12 How does that then translate into
13 fiber years? Does fiber years relate to dose,
14 cumulative dose? Let me ask you that, first of
15 all.

16 A. It does. It is --

17 Q. So the concept of fiber years is the
18 cumulative dose of a particular worker; for
19 example, a brake worker or auto mechanic, right?

20 A. Or any asbestos exposure.

21 Q. In terms of measuring cumulative exposure
22 in fiber years, how do you get from the fiber
23 year dose number -- how do you get there from the
24 fibers per cc. number?

25 A. Again, we've determined what is in all
26 the air that was breathed during the day and

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1 C. Blake - by Defts. - Direct
2 we've divided that down, so the number is simple
3 to work with, to fibers per cc. That's the
4 average for the day.

5 Then we figure the number of days
6 worked and the number of years worked times the
7 average.

8 It's like if you drive ten miles an
9 hour all day, your average would be ten miles an
10 hour.

11 THE COURT: Okay. Why don't we take
12 a five minute break and let the jury
13 stretch their legs.

14 (Whereupon, the sworn jurors were
15 excused from the courtroom.)

16 MR. MEADOW: Judge, I'm wondering
17 when it's going to relate to anything in
18 this case?

19 THE COURT: What I don't understand
20 is when it's going to become anything
21 other than artificial construct about
22 which I still don't understand the
23 mathematical basis.

24 And I have an obligation to protect
25 the jury from junk science, so --

26 MR. MEADOW: I don't see how it can

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1 C. Blake - by Defts. - Direct

2 become relevant to this case because he
3 said he vaguely recalls what Mr. Lopez
4 did.

5 So, how can it possibly relate back
6 to whatever this theoretical
7 pontification we've been listening to for
8 a half-hour?

9 THE COURT: I can understand more or
10 less. I can't understand talking -- and
11 when it does, it relates to --

12 MR. CLARKE: We're talking about the
13 concept of dose and what Mr. Lopez or --
14 hypothetically what his dose may have
15 been during the course of his career as
16 an automobile mechanic.

17 MR. GORDON: I don't think you can
18 ever get to that.

19 THE COURT: We've had doctors here
20 and all sorts of experts here, and none
21 have talked about fiber years.

22 So, you have to tell me what this
23 means; what this is mathematically.

24 MR. CLARKE: It has to do with his
25 exposure, your Honor.

26 MR. GORDON: There was no report

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1 C. Blake - by Defts. - Direct
2 about Mr. Lopez. What we were told in
3 that room very clearly was he was going
4 to restrict it to reviewing the
5 literature.

6 THE COURT: "That room," also known
7 as my robing room.

8 MR. GORDON: For the record, the
9 robing room. I was indicating towards
10 the robing room -- and that he was going
11 to review the literature.

12 If he wants to explain the concepts
13 of Plato, he wants to explain the
14 concepts of Rohl, fine.

15 Now he's trying to take a step that
16 we did not do with Dr. Longo that we did
17 not do for the very reasons they objected
18 to.

19 He can talk about what the
20 literature has indicated. He's trying to
21 jump from that without giving a report
22 and without giving an adequate basis to
23 try to say this guy, Mr. Lopez, could not
24 have had exposure to asbestos at levels
25 that were dangerous.

26 He's not a doctor. He can simply

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1 C. Blake - by Defts. - Direct

2 talk about what the literature says.

3 That's what we were told he was going to
4 talk about.

5 MR. CLARKE: That's not correct,
6 your Honor.

7 He's an industrial scientist, and he
8 measures exposures. So, we're simply
9 trying to talk about what his exposures
10 may have been or dose; not in a medical
11 sense but his cumulative exposure as an
12 auto mechanic may have been based on the
13 brake repair work he did.

14 THE COURT: Okay, but I have an
15 obligation to insure that that may at
16 least have some basis.

17 And so far, we're talking about --
18 now, let me go back to the example of
19 pack years. Pack years is very simple.
20 Over the course of 24 hours, you smoke 20
21 cigarettes for 40 years. We call that 40
22 pack years.

23 MR. CLARKE: It's a similar concept,
24 your Honor.

25 THE COURT: I know it's a similar
26 concept, but what does it relate to?

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1 C. Blake - by Defts. - Direct

2 We've got brake dust. Okay. You heard
3 the additions to the hypothetical. We
4 have all of these people working in all
5 of these places doing all of these
6 things.

7 We don't know what the measurement
8 was. We just have an absolute
9 description of it.

10 How we then jump to assuming that we
11 have a quantification of it without
12 saying it's similar -- we haven't talked
13 about the stuff on his clothing that he's
14 taken home and breathed. We haven't
15 talked about anything that might relate
16 to it.

17 And then to go magically to one
18 fiber year -- Jeez, that's great stuff.
19 Only where is the Wizard of Oz behind the
20 curtain?

21 You have to explain to me what the
22 mathematical basis of it is, and I have
23 not found it inferentially obvious.

24 I will allow you to talk to your
25 expert. And if you can't come up with an
26 explanation, I do believe it's my

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1 C. Blake - by Defts. - Direct
2 obligation to strike the testimony.

3 MR. GORDON: Judge, that's my
4 request.

5 MR. CLARKE: Let me have five
6 minutes and then we'll make sure the
7 witness is clear.

8 THE COURT: Okay. I don't mind more
9 or less. I do mind quantifying it in a
10 way that can't be followed.

11 MR. CLARKE: Understood.

12 MR. GORDON: I'm sorry for being
13 slow getting up here with counsel. We
14 don't want to look obstreperous in front
15 of the jury, but I don't think it's
16 appropriate.

17 MR. MEADOW: Judge, I don't like to
18 normally interrupt anybody's direct.

19 (Whereupon, there was a short recess
20 taken at this time.)

21
22
23 (CONTINUED ON FOLLOWING PAGE)
24
25
26

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1 Blake - Defendant - Direct/Clarke

2 (Whereupon, after the recess the trial
3 resumes.)

4 MR. GORDON: We have a motion to strike the
5 testimony as not being reliable upon which the jury
6 could draw any reasonable inferences. Everything
7 relating to Mr. Lopez in his estimation of .3 to .7
8 fibers, a number, by the way, which didn't change at all
9 with the addition of any of the additional hypothetical
10 issues such as 13 co-workers doing the brake jobs every
11 day, and this is also in addition to being without any
12 basis that I can understand scientifically, something
13 that is very much outside the scope of the -- of what
14 was told to us in the robing room as well as what was
15 written in the expert disclosures. Nothing was to deal
16 specifically with Mr. Lopez.

17 I believe they are trying to get in things
18 through the back door from the study which was
19 withdrawn. This witness was supposed to, in my
20 understanding, talk about what the literature has shown
21 about brake dust exposure from asbestos and levels.
22 Going over Rohl and Plato and et cetera, trying to use
23 the witness in an improper way without a scientific
24 basis.

25 MR. CLARKE: Judge, we will attempt to
26 establish the issue of -- we will review the industrial

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1 Blake - Defendant - Direct/Clarke

2 hygiene literature for this witness to establish
3 objective exposures or potential exposures and the issue
4 of time-weighted average that he has been trying to
5 testify about, as well as the issue of dose, in terms of
6 cumulative exposure.

7 THE COURT: But let me go back to several
8 points. First I have a role and obligation to the jury
9 to assure that the testimony that they receive first,
10 and even before Frye is meaningful and is not just
11 confusing.

12 And then second, I have an obligation post
13 Frye to assure that it has some scientific rationale.
14 There is also a general obligation to assure that the
15 jury is not presented with testimony that is just
16 possibility in relation to the specific facts.

17 MR. CLARKE: I understand that, your Honor.

18 THE COURT: I don't understand under all of
19 those general standards how the information, at least as
20 I saw the line developing, doesn't run afoul of all
21 three of them.

22 MR. CLARKE: Your Honor, it went ahead too
23 quickly without establishing the basis of this witness's
24 knowledge of essentially industrial hygiene with respect
25 to automobile auto mechanic exposure with brakes. The
26 support in the literature, which we should go through,

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1 Blake - Defendant - Direct/Clarke

2 obviously I skipped that which formed the basis of his
3 opinion in terms of brake mechanic exposure.

4 THE COURT: Well, maybe we ought to back up
5 then and I will allow a voir dire on his qualifications
6 as to brake mechanics. Would that help any?

7 At the moment I am not feeling at all secure
8 in allowing this line of testimony to proceed.

9 MR. CLARKE: Judge, this is industrial hygiene
10 testimony. He will review the industrial hygiene
11 literature and discuss the exposure levels.

12 MR. GORDON: Your Honor, that's exactly what
13 we were told he was going to do and that's not what we
14 heard here today. We heard about Mr. Lopez and
15 hypotheticals and we have not -- and we heard the name
16 Plato, but it is well beyond the scope. We would like
17 to voir dire.

18 In addition, we would like at this point when
19 the jury returns for there to be an instruction, at the
20 very least, that everything with regard to and the -- to
21 anything about Mr. Lopez should be struck. I would like
22 to move and have Mr. Meadow begin some cross examination
23 so you can see how slim this basis is for this witness.

24 THE COURT: Okay. Yesterday when we discussed
25 this, and remember all of this comes out of a background
26 that there was going to be a study, and I don't know how

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1 Blake - Defendant - Direct/Clarke

2 much of it is on the record, that there would be a study
3 introduced and we would have videotapes introduced and
4 none of which were ever served on the plaintiff until --

5 MR. GORDON: Never and still has not been.

6 THE COURT: Even though I instructed it to be
7 served, even though they would not be offered.

8 MR. GORDON: But the defendants withdrew the
9 report and, therefore, said they would not supply the
10 videotapes. It doesn't mean this witness -- well, this
11 witness is forming his basis for relying on it. When he
12 was specifically asked what are you relying upon as an
13 industrial hygienist, the first thing he said was my air
14 sampling and published literature and medical literature
15 and epidemiological studies.

16 MR. CLARKE: He is not talking about his own
17 samples. He is talking about that in terms of relying
18 on it but he is not testifying about it in this case.
19 He is testifying about industrial hygiene and the basis
20 for his industrial hygiene positions in terms of
21 exposure to brake mechanics.

22 MR. GORDON: This man has no basis to
23 testify. Mr. Lopez has .3 to .7 fiber years exposure
24 because he didn't change the estimate one iota with the
25 addition of 13 co-workers, with the addition of taking
26 it home on his work clothes and with the addition of the

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1 Blake - Defendant - Direct/Clarke

2 ventilation having no ventilation. We know from the
3 studies all of those things matter. I think you will
4 see from Mr. Meadows voir dire that there is just no
5 basis for that.

6 Nothing should relate to this particular
7 plaintiff from this particular witness.

8 THE COURT: Well, there are numerous points in
9 the study that was presented that he was going to
10 testify about. Well, including the exhaust filters
11 started jamming up after twenty minutes of doing only
12 one. Apparent brake grinding or blowing of both.

13 MR. CLARKE: Not talking about the studies.
14 Simply talking about the general issue of industrial
15 hygiene.

16 MR. GORDON: More general issues of industrial
17 hygiene --

18 THE COURT: Wait, plus what is the fiber years
19 correspond to. I have not heard about any scientific
20 things that talks about mesothelioma and fiber years.
21 Talks about fiber size and talks about threshold.

22 MR. CLARKE: Judge, he is not a medical doctor
23 to talk about mesothelioma. He is not qualified to
24 discuss those causations. He is qualified to talk about
25 exposure issues from the conduct or activities of the
26 auto mechanics who specifically do brake work and what

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1 Blake - Defendant - Direct/Clarke

2 type of exposures they may experience and how that
3 exposure translates to the doses received over the
4 course of a career as an auto mechanic.

5 MR. GORDON: He is saying all garage mechanics
6 no matter how long they work and no matter how many
7 brake jobs they do and how many co-workers have point --

8 MR. CLARKE: That's not what he is saying.

9 MR. GORDON: We have no basis for it.

10 THE COURT: I don't see how this adds
11 anything. What does it say about the issue of our case
12 and what if any other evidence does it relate to. You
13 just told, me at least this is what I make out of your
14 comments, that we will not relate fiber years to
15 mesothelioma and no other witness has related fiber
16 years to mesothelioma..

17 MR. CLARKE: No.

18 THE COURT: So even if we knew what it was --

19 MR. CLARKE: I didn't say that.

20 THE COURT: Which I still don't understand.
21 Nor how are we deriving it as a hard figure based on
22 facts that no one else has found quite so clear cut. I
23 mean after all, this witness is saying that he knows
24 enough about Mr. Lopez's condition that he can take the
25 equivalent of one of these air intake valves with the
26 filter and tell us how many filters would have come down

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1 Blake - Defendant - Direct/Clarke

2 on that filter and for how many years that would have
3 been true. That is the only thing I can make out of his
4 testimony. And that I find beyond audacious.

5 So unless you have something sensible to say
6 to me I am going to strike the testimony and we will
7 proceed.

8 MR. BISHOP: Your Honor, if I might respond
9 briefly. You asked about the relationship between fiber
10 years and medical issues of the case. You might recall
11 Dr. Churg testified with respect to chrysotile, it was
12 his opinion that the threshold for adducing disease of
13 any kind from chrysotile exposure was in the range based
14 cross examination as well in the range of 50 to a
15 hundred fiber years. In fiber years is a recognized
16 scientific concept. It is in many of the industrial
17 hygiene articles as well as the medical literature that
18 fiber years represents the cumulative asbestos exposure
19 of an individual to asbestos. It is calculated on the
20 basis of your average exposure to asbestos times the
21 number of years that you are exposed.

22 MR. GORDON: That is fiber years. And fiber
23 ccs years are different things, first of all. Second of
24 all, Dr. Churg, that is their witness. They are trying
25 to bolster by saying we had another witness testify
26 about that which first of all would make his testimony

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2 cumulative.

3 The plaintiff's position is no safe level
4 exposure, which is also the U.S. Federal Government's
5 opinion, however, your Honor's point is exactly right.
6 You take what he is trying to do is say I have measured
7 this air filter on Mr. Lopez and this is what we find.
8 It is not even close to it and no basis for it
9 whatsoever. And the fact that Churg says there is an
10 idea of fiber years now that makes all of this
11 admissible, that's the best they can say. I don't think
12 it makes it even close. His testimony should be struck,
13 your Honor.

14 MR. BISHOP: Your Honor, I would respond --

15 THE COURT: I know, but I am not saying
16 ideologically that the concept has no relevance but to
17 say we can quantify it is mind boggling. And the only
18 basis on which we can have a quantification is the study
19 which has been withdrawn, and which I pointed out to
20 you, I believe it was off the record, unfortunately had
21 massive problems in terms of the collection of the data
22 and a lack of accountability. That's why it was
23 withdrawn. And as well as it not having been mentioned
24 in any of the reports or any of the videotapes or a copy
25 of the study have not been given to plaintiff before
26 their expert was on the stand, or even up until the time

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2 that we have discussed the matter.

3 Okay, we can bring in the jury.

4 MR. MEADOW: Judge --

5 MR. CLARKE: Judge, before we bring in the
6 jury, can I know what your ruling will be?

7 THE COURT: I told you I will strike the
8 testimony about the number of fiber years relating to
9 Mr. Lopez. You have not finished with the witness. I
10 am not telling you to sit down.

11 MR. MEADOW: Then I have a motion to strike
12 the witness in its entirety. The testimony now becomes
13 cumulative to Dr. Crapo.

14 THE COURT: All right, bring the jury in.

15 (Whereupon, jury enters the courtroom.)

16 THE COURT: Thank you. You can sit down. Let
17 me read the juror's note.

18 "Juror number one: Judge Lebedeff, thank you
19 for having the witness clarify fibers per cc. I am
20 still confused and would appreciate further detail. It
21 would also be very helpful for you to continue to
22 paraphrase the responses, since you seem to be able to
23 get to the heart of the matter.

24 "Thank you."

25 I will have this marked as a court exhibit. I
26 am going to strike the testimony about the fiber ccs to

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which Mr. Lopez was exposed. To me this seems to be beyond ESP. In order to say the number of fiber years and just to try and say it very clearly fiber years it is my understanding that that would be virtually having a fiber collection cup right next to his breathing area for all of those years and being able to count it.

We have so many variables I have not even established so far that somebody could have done that on a one shot basis much less to try and statistically project that into a number of years. So I am just striking the testimony. I don't think it is of any assistance to you.

(Whereupon, the note from the juror is marked as Court's Exhibit III.)

THE COURT: Now if you can just put the overhead up because I had difficulty with the overhead that was indeterminate of time but related to fiber ccs. If you can just put that down.

MR. CLARKE: Sure.

THE COURT: Now, my ruling means I am not saying that these factors might give you more or less exposure, just to whatever extent it would lead to an absolute number in this case cannot be established.

Okay, you may proceed.

DIRECT EXAMINATION (Continued)

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CIVIL TERM : PART 2

RODOLFO COLELLA and MARIA COLELLA,

Plaintiffs,

- against -

Index #
103894/05

A.C.&S., et al.,

Defendants.

ALFRED D'ULISSE and MARGARET D'ULISSE,

Plaintiffs,

- against -

Index #
113838/04

A.C.&S., et als.,

Defendants.

TRANSCRIPT OF CONFERENCE/MOTION PROCEEDINGS

Place: New York Supreme Court
71 Thomas Street
New York, New York

Date: August 31, 2006

B E F O R E:

HONORABLE LOUIS B. YORK, Justice

(Appearances on Appearance Page)

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Senior Court Reporter
60 Centre Street - Room 420
New York, New York 10007
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A P P E A R A N C E S:

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1 insulation that D'Ulisse used may have contained amosite
2 is admissible since at least the admissible evidence shows
3 that plaintiff worked with block insulation, but only if
4 Dr. Lee can convincingly establish that he relies on
5 information or authorities routinely relied on by experts
6 in the field of materials characterization which analyze
7 the constituent components of the materials and is based
8 on evidence in the record. This will be determined by an
9 examination of Dr. Lee out of the presence of the jury
10 before he testifies.
11

12 All right. What's next?

13 MR. KRISTAL: Your Honor, we have our dose
14 reconstruction argument and this goes to a Dr. Redinger
15 and a Dr. Toca and also to the extent that Dr. Corn's late
16 supplied report relates to it and it's been argued in
17 other cases.

18 What the defendants tried to do is take sample
19 measurements from totally different scenarios, take
20 average exposures from other scenarios and extrapolate
21 backwards to what the types of exposures were that
22 Mr. D'Ulisse and Mr. Colella had.

23 For example, both of the experts and Dr. Corn,
24 Redinger, Toca and Corn rely on an article that was
25 written by a Dr. Paustenbach, P A U S T E N B A C H.
26 Dr. Paustenbach is another, he's a former Exponent

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2 consultant who was paid all this money by Ford, GM and
3 Chrysler to do this research, and he comes up with an
4 average exposure to brakes and clutches, a .04 fibers per
5 cubic centimeter.

6 The way he gets to that number is, he takes
7 hundreds of samples, most of them when there were dust
8 control measures in place, and he averages them out and he
9 says that those are the typical exposures that brake
10 mechanics and people working with friction products would
11 have.

12 Of course Mr. D'Ulisse and Mr. Colella didn't
13 have any dust control measures in place. Mr. D'Ulisse at
14 one point mentioned some sort of exhaust on a grinding
15 machine, but when there were samples where the sample --
16 the air is being sampled and the dust is being controlled
17 by wetting the brakes with special solvents and special
18 vacuums are being used and special measures are being used
19 to reduce the dust by these very high efficiency exhaust
20 vacuums. Those measurements, of course, are going to be
21 low measurements because they had controls in place.

22 When you then try to say, "Ah hah!
23 Mr. Colella's exposure must have been similar to those,"
24 it's ridiculous because Mr. Colella didn't have any of
25 those measures in place. Mr. Colella was blowing out
26 brakes with compressed air. He was grinding on brakes.

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There was no wetting down of the dust.

So to take falsely low samples and extrapolate backwards to a precision of hundreds of fibers per cubic centimeter is something that's beyond science, and I think there was a quote from Judge Lebedeff where she said it was, you know, junk science and something that shouldn't be considered. I think her quote is it's beyond ESP, and it is, because there was nobody there at the time measuring what their particular exposures were.

THE COURT: Opposition?

MR. DEUTSCH: Briefly, just on one point, Your Honor, again directed towards the adequacy of the papers in support of the motion.

I'll let other counsel argue the substantive portion of the motion, but we have a group of scientists, all with, I believe, doctorates in their requisite field who have offered an opinion about the scientific validity of what they have done.

Plaintiff, through an attorney's affirmation, can't challenge the legitimacy of the science. Plaintiff doesn't have -- the plaintiffs' attorneys don't have the expertise to put into question the legitimacy of the science. If they want to put in question the legitimacy of the science, what was required as a matter of law was some sort of affidavit from a scientist suggesting that

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the scientific approach undertaken by the defense witnesses is somehow lacking.

To allow a plaintiff's attorney to challenge a scientist doesn't rise to the legal adequacy, and I would leave the substantive motions about what they did and why what we did was different than what Judge Lebedeff was addressing for other counsel.

MR. HANNAN: Your Honor, Christopher Hannan on behalf of Pneumo Abex.

Your Honor, the plaintiffs mischaracterize the methodology that's been adopted by Dr. Redinger and Dr. Toca in this case. Plaintiffs would have you believe this is a dose reconstruction analysis that these experts are engaging in. I submit to you that is not the case at all.

The methodology that's been used by Redinger and Toca in this case is what is known as exposure assessment. It is a recognized body of literature within industrial hygiene. Plaintiffs have not made a prima facie showing that exposure assessment is in any way novel and if they had, Your Honor, I think we have shown through our papers and through the testimony provided by Dr. Redinger in his recent deposition that exposure assessment is generally accepted in the field of industrial hygiene.

Contrary to plaintiffs' assertions, we will not

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2 have our experts testify about specific number of fiber.
3 That's an argument that is raised in the dose
4 reconstruction analysis that was the subject of Judge
5 Lebedeff's ruling. In fact, in the case of Judge
6 Lebedeff's ruling, she did not exclude the testimony of
7 the industrial hygienist in that case. Rather, she
8 considered the testimony entirely.

9 What she did was, she, and I'll quote, "My
10 ruling means I am not saying that these factors might give
11 you more or less exposure, just to whatever extent it
12 would lead to an absolute number in this case cannot be
13 established."

14 What that means is, Judge, the industrial
15 hygienist may not give you a specific calculation as to
16 the precise fibers per cc that Mr. Colella or Mr. D'Ulisse
17 may have experienced at any point during their working
18 careers, but it does not mean they cannot offer an opinion
19 about whether those exposures were in excess of
20 permissible exposure limits by O.S.H.A. or N.I.O.S.H.

21 In fact, the other basis for the plaintiffs'
22 motion is some minutes from the American Industrial
23 Hygiene Association conference in 2002. And plaintiffs
24 point to that in support of their motion suggesting that
25 the study of exposure assessment has been roundly
26 criticized, that it's not generally accepted. It's quite

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contrary, Your Honor.

If you look at conference minutes, it's clear that there's this distinction between dose reconstruction, something that we are not engaging in here, and the science of exposure assessment. While we concede the fact that dose reconstruction was criticized at the conference by certain of the speakers, those same speaker, including Dr. Corn and others, stated affirmatively that exposure assessment is "A superb scientific method that is generally accepted within industrial hygiene studies."

Again, they missed the boat. They are arguing that our experts are going to attempt to ascribe certain fibers per cc to these plaintiffs' exposures looking back retroactively. They are not attempting to do that. What they are attempting to do is draw an analogy of studies, actual hands on studies, that are conducted in garage settings similar to the exposures experienced by these plaintiffs and inform you of their opinions about whether or not these plaintiffs, based upon what we know about them, based upon their own testimony, would have experienced exposures in excess of permissible limits. Not specifically this exposure was .03 cc's based upon what I know of the plaintiffs' testimony, but rather than generally speaking, exposure assessment science tells us what we know about brake mechanics and work they do based

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1
2 upon actual studies where people have gone in garages and
3 taken their samples we know that the exposure that
4 Mr. Colella and Mr. D'Ulisse experienced was not in excess
5 of the PELs that have been established by the EPA.

6 Furthermore, I submit to you that the arguments
7 that Mr. Kristal has put forth before, that is the Hasback
8 study was funded by the Big Three, goes merely to its
9 weight, not its admissibility. These are all arguments
10 that are a proper for subject of cross-examination. They
11 have nothing at all to do with the final issue and
12 therefore these witnesses should not be precluded from
13 offering opinions as set forth in their reports.

14 MR. KRISTAL: May I briefly?

15 Two things: First of all, whether an exposure
16 was or wasn't above a permissible O.S.H.A. limit is
17 completely irrelevant. It has nothing to do with failure
18 to warn or not, unless the defendants are saying anything
19 below it, a permissible O.S.H.A. limit, doesn't increase
20 the risk of cancer. That's totally not true and I don't
21 think any of their experts are saying that.

22 Secondly, to say that we are not putting numbers
23 on this, we are just going to characterize it as above or
24 below the O.S.H.A. standard is, by definition, putting
25 numbers on it. The current O.S.H.A. standard is .15 cc.
26 So if somebody comes in and says Mr. Colella's exposure

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was below the current O.S.H.A. standard, by definition they are saying it's below .15 fibers per cc.

The final thing is, there were a lot of N.I.O.S.H., National Institute of Occupational Safety and Health studies that were done closer in time to Mr. Colella and Mr. D'Ulisse's exposure where there were no controls in place that showed very high exposures to exposure to asbestos. So in picking and choosing samples that are not representative of the actual exposures and saying this person's exposure is based on those samples, it's just inappropriate.

Dr. Corn himself at this meeting that Mr. Hannan just references said, "When a dose reconstruction is performed, we are in an arena to persuade. This isn't science."

So we don't need to come in with an affidavit of one of our experts when their own expert has testified at this hearing that that's what dose reconstructions are all about.

MR. DEUTSCH: Your Honor, just on the last comment, Mr. Kristal quoting Dr. Corn. Attached to my opposition papers is an affidavit from Dr. Corn stating affirmatively that Mr. Kristal's representation is not an accurate one of what his statement was.

MR. KRISTAL: I'm just quoting the transcript.

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2 THE COURT: I read Dr. Corn's statement. I did
3 from -- yeah, from the transcript. He did say this is not
4 science.

5 MR. DEUTSCH: That wasn't the transcript.

6 MR. HANNAN: Judge, he's talking about dose
7 reconstruction. Again if I didn't make my point earlier,
8 I apologize. There's a difference between dose
9 reconstruction, which is what Dr. Corn is referring to,
10 and his statement that Mr. Kristal just read and exposure
11 assessment. It's clear from the transcript at the
12 conference that these are two different areas within
13 industrial hygiene.

14 Now, if I could just have one moment, please.

15 MR. DEUTSCH: While he's looking, Your Honor, I
16 would note that Dr. Corn, while Mr. Kristal quotes
17 something that was made in a conference, Dr. Corn has
18 executed an affidavit under oath where he affirmatively
19 states that what was done in this case is, in fact, good
20 science and commonly done.

21 So on the one hand we have a comment not under
22 oath at a conference referencing a different matter of
23 science than is before us. In his opposition we have a
24 sworn affidavit addressing the issue that is before us
25 where Dr. Corn, Mr. Kristal himself holds up as one of the
26 world's authorities on this subject.

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MR. KRISTAL: Why would you say that?

MR. DEUTSCH: That's how you phrased him in your affirmation in support of your motion. If I misspoke, I take it back, but that is my recall.

Nonetheless, Mr. Corn has stated under oath that the science undertaken in this case is, in fact, valid science. So I think if one is going to weigh an unsworn at conference statement about something in relation to their sworn statement about what we are talking about, I think the defense's position necessarily has to win out.

MR. HANNAN: Two other minor points, whether there were controls in place, ventilation, et cetera, methods in the Hasback study is the subject of cross-examination. If there are N.I.O.S.H. studies that were closer in time to the plaintiffs' exposure in this case, that indicates greater levels of exposure that Mr. Kristal would be permitted to ask about isn't on cross-examination. It's absolutely relevant, but it's not a basis for preclusion.

I'd also like to point Your Honor, to a section of the minutes from the 2002 conference. This was by moderator Frederick Bobolter, B O B O L T E R, certified industrial hygienist and licensed professional engineer. He explained that exposure assessment is simply, "An examination of past activity's potential for injury, for

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disease attribution." And he observed that, "Techniques are generally accepted by the scientific community."

Again, there's a clear distinction between dose reconstruction, something we are not engaging in here, and exposure assessment.

THE COURT: Are we finished?

MR. KRISTAL: Just so I'm clear, are the defendants --

THE COURT: This is the last comment.

MR. DEUTSCH: Guess not.

THE COURT: It's his motion. I'm letting him have the last comment. That will be it.

MR. KRISTAL: Is Dr. Corn not offering a dose reconstruction in terms of specific fiber levels?

MR. DEUTSCH: I think he's doing exactly what the co-defendants are suggesting is being done.

MR. KRISTAL: Okay. That's not what his report says. I'm glad to have clarified that.

THE COURT: Okay. My decision is that the motion is granted.

The so-called facts relied upon by defendants in making their assessment are based on facts not in evidence or within the personal knowledge of defendants' experts starting with the level of dosage at each individual site and its duration at the venues where plaintiffs were

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1 actually employed.

2 What's next?

3 MR. KRISTAL: I think that's all of our motions,
4 Your Honor. I think that's correct, and I don't -- I
5 think that's it.
6

7 MR. DEUTSCH: There were a couple of things for
8 the defendants respectively. Some of them we have
9 covered, some of them we haven't.

10 There are outstanding depositions remaining even
11 at this late date of family members of the plaintiff that
12 have been agreed to and for logistical issues haven't yet
13 taken place. I just would like some commitment from the
14 plaintiffs to when that is going to take place, when those
15 people are going to be produced for deposition.

16 That's the first issue, Your Honor.

17 THE COURT: Well, I'll ask you to respond,
18 please.

19 MR. KRISTAL: Clearly before they testify and
20 you raised this with me a couple of days ago in Detroit.
21 Michael Roberts is handling this. The widows -- not the
22 widows, the soon to be widows, but the wives who will be
23 testifying will be produced for deposition. The Special
24 Master said it should be before they testify obviously.
25 It's just a couple of days before they testify. So
26 Michael will set that up. If it's not next week, it will

In The Matter Of:

*AMERICAN INDUSTRIAL HYGEINE CONFERENCE
& EXPO 2002, et al.*

*TRANSCRIPT FROM AUDIOTAPES
June 27, 2002*

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JULY 27, 2007

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(14)
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(16) Doug Fowler
(17) John Spencer
(18) Jim Rasmuson
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(21)
(22) Transcript from audiotapes
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(1) SPEAKER: The AIHA and ACGIH presents
(2) Asbestos Exposure Dose Reconstructions, recorded live
(3) at the American Industrial Hygiene Conference and
(4) Expo 2002.
(5) SPEAKER: This is the Asbestos Exposure
(6) Dose Reconstruction Forum 244. We have five people
(7) here today. One person, unfortunately, was not able
(8) to make it.
(9) I would like to introduce everyone at the
(10) beginning. This session, by the way, is sponsored by
(11) the Risk Assessment Committee of AIHA, and in the
(12) back of the room there is a handout that is available
(13) for the risk symposium that is going to be sponsored
(14) by the Risk Assessment Committee as part of the PCIH
(15) this September in Cincinnati, so please pick up a
(16) brochure.
(17) I think there is an AV person outside.
(18) Are there any questions?
(19) (Technical difficulties.)
(20) I hope you enjoyed your computer class
(21) this morning.
(22) FRED BOELTER: The speakers today are —
(23) Larry Birkner was unfortunately unable to join us.
(24) Larry is a Certified Industrial Hygienist and
(25) Certified Safety Professional.

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(1) I am a — I am Fred Boelter, and I am a
(2) Certified Industrial Hygienist and a Licensed
(3) Professional Engineer. I have been in the
(4) occupational arena since 1973 and have been in the
(5) consulting field of my own since 1985.
(6) Bill Dyson is a Ph.D. and Certified
(7) Industrial Hygienist with Workplace Group. He has an
(8) undergraduate in chemical engineering and a masters
(9) and doctoral degrees in environmental health
(10) engineering. He is also the Past President of the
(11) American Academy of Industrial Hygiene and has been
(12) an officer with the AIHA.
(13) Doug Fowler is a Ph.D. and Certified
(14) Industrial Hygienist with Fowler Associates. He's a
(15) lecturer for several courses in industrial hygiene at
(16) Berkeley. He is also a former program manager with
(17) the Stamford Research Institute. He has been a peer
(18) reviewer of a number of articles in the Journal of
(19) the American Industrial Hygiene Association.
(20) Jim Rasmuson is a Ph.D. Certified
(21) Industrial Hygienist and Diplomate of the American
(22) Board of Toxicology. He has a Ph.D. in analytical
(23) chemistry and is certified in both the chemical
(24) aspects as well as comprehensive practice of
(25) industrial hygiene.

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(1) He has authored a number of papers,
(2) including an award winning study on Pathways of Lead
(3) Uptake in Kazakhstan Infants and Children.
(4) John Spencer is a Certified Industrial
(5) Hygienist, Certified Safety Professional, Registered
(6) Sanitarian. He is President of Environmental
(7) Profiles in Baltimore and has been a team leader for
(8) NIOSH as well as a hygienist for the Coast Guard.
(9) I want to give a quick overview of dose
(10) reconstruction. Dose reconstruction is a science
(11) based on an exposure assessment. It's fundamental
(12) application is in source pathway receptor analysis,
(13) patent transport as some might know it. Its
(14) applications are in risk assessment, accidental
(15) releases or disturbances, epidemiologic studies and
(16) disease attribution.
(17) Dose reconstruction is an examination of
(18) past activity potential for injury or disease
(19) attribution. It is also an examination of the risk
(20) presented by a recent unanticipated exposure.
(21) Techniques are generally accepted by the
(22) scientific community and it is reproducible within an
(23) acceptable degree of scientific certainty. The
(24) process is one which is intended to correlate the
(25) dose with epidemiologic information and standards.

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An exposure assessment is the estimation and measuring of exposures and it is a fundamental part of industrial hygiene and it has been around for more than 60 years. It has been defined and laid out in a number of studies over the past 20 years.

The National Academy of Sciences' four-step paradigm, which includes hazard, slope factors, exposure assessment, and risk assessment, was published in 1983 and is known as the Red Book.

U.S. EPA Risk Assessment Guidelines for Superfund was published in 1985 and contains essentially the same process.

The U.S. EPA exposure factors also in 1989 contain information that is useful in a dose reconstruction, as does the Agency for Toxic Substances Disease Registry, the ATSDR, '92, the U.S. EPA Guidelines for Exposure Assessment in '92, as well as the ASTM Rebecca Guidelines of 1985.

In reconstructing a dose, we need an exposure assessment. Exposure assessment is based on estimates of concentration, work activity duration, employment duration, as well as information that is based on memory, hard data, experience, extrapolations, interpolations, interpretations, reconciliation, judgment, logic. A reconstructed

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dose is an estimated range.

Ultimately when we do a dose reconstruction, looking at the result, it has to make sense. Clearly if the dose that is calculated is too high or too low, from what we know as industrial hygienists to be a reasonable range, we have to go back and take a look at the assumptions or the estimates that were used in reconstructing that dose.

A simplified dose calculation is concentration times time equals dose. We have an exposure, we have a duration of that exposure, that equal to the dose.

The concentration is going to be based on the activity being performed, the source of the contaminant, the controls that are in use, as well as the proximity of the individual to the source.

Time is going to be based on the duration of the task as well as the length of employment.

In reporting dose related to asbestos specifically, the dose is reported in the term that is called fiber years per mill, or frequently known as fiber years. It is typically reported as a range of likely doses. It may be a probability distribution, and it may be compared against some reference. What will follow in this forum are the

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(1) techniques used by six professional industrial hygienists who practice in different parts of the country, and the dose reconstructions are performed in essentially the same way. Build a timeline, reconcile the information, judge the information, select empirical data for use, generate missing data, if possible, and then ultimately analogize in the absence of directly applicable data, and from this process, we calculated a range of likely doses.

(10) What I would like to do is to have Doug Fowler do the first presentation as is the order in the announcement.

(13) DOUG FOWLER: Thanks very much, Fred.

(14) This is a distinguished audience here today. One of my former colleagues, Dr. Roy Balzer is here, Dr. Jack Peterson, Mr. Allen Rogers, Mike Williams, Barbara Cohrsen, many people who are my peers in age, at least, some of whom were my bosses from time to time, and it is a great honor to be presenting this material to you.

(21) The work I will describe was done on behalf of attorneys for a Plaintiff in the asbestos litigation. The question was really whether a particular kind of exposure was "significant" or "substantial," and those are words which have special

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(1) legal meaning, I am told. They may have special industrial hygiene meaning as well.

(3) This was a unique — this stuff is way too complicated for me, I am an old person here.

(5) What was the purpose of the evaluation? Basically the Plaintiff had mesothelioma, and the presumption is that a person who has mesothelioma and who had asbestos exposure developed the mesothelioma as a consequence of that asbestos exposure.

(10) This fellow had had a relatively brief and relatively light history of exposure to asbestos. And I will go into that in a bit. But the specific question was whether the product manufactured by one of the Defendants, who was a gasket manufacturer, could have given rise to exposures to asbestos that were significant or substantial.

(17) Now as I am sure most of you are aware, ordinary exposures in handling of gaskets in the normal course of work with gaskets are relatively trivial; however, in this case, the gaskets were stacked and he band sawed those gaskets over a period of a day or so each time he did this activity. And so the Plaintiff's lawyers contended that this operation contributed in some meaningful way to this man's disease.